In the Privy Council.

No. 46 of 1948.

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN—THE PROVINCIAL TREASURER OF MANITOBA ... ... APPELLANT

AND

WM. WRIGLEY JR. COMPANY LIMITED RESPONDENT.

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal by special leave from a Judgment of the Supreme Court of Canada, dated the 18th June, 1947, which, by a majority (Rinfret, C.J.C. and Taschereau and Estey JJ. ; Rand and Kellock JJ. dissenting) restored a Judgment dated the 10th March, 1943, of the Court of King's Bench in Manitoba (Major J.) which had been reversed by a Judgment dated the 19th of September, 1945, of the Court of Appeal for the Province of Manitoba (McPherson C.J.M., Dennistoun and Bergman JJ.A. ; Trueman and Dysart JJ.A. dissenting). p. 201 p. 144 p. 152

10 2.—The facts are not in dispute. As stated in the Judgments they may be summarised as follows : The Respondent, a Dominion company with its head office and manufacturing plant in Ontario, carries on business in Manitoba where it has a branch office and a warehouse in which chewing gum, manufactured in Ontario, is stored for sale and distribution. All orders to the Respondent for chewing gum from Manitoba, Saskatchewan, Alberta and parts of Ontario adjacent to Manitoba, are received by the Respondent's office in Winnipeg, Manitoba, and these orders are filled by that office out of the stocks of chewing gum in the Manitoba warehouse. When a sale is made by the Winnipeg office an invoice is made out in
20 triplicate. One copy is sent to the customer, one copy is sent to the head office in Ontario, and one copy is retained by the Winnipeg office. The sale price is payable at the Respondent's head office in Ontario. In the Respondent's books, entries are made whereby the head office " charges " the Winnipeg office an arbitrary " price " of 28 cents per unit (for ordinary p. 147, l. 26 to p. 148, l. 33 ; p. 153, ll. 9–21 ; p. 154, ll. 1–8 ; p. 166, ll. 19–34 ; p. 203, ll. 11–24 ; p. 211, l. 41 to p. 212, l. 7 p. 154, ll. 1–8 ; p. 169, ll. 21–42

RECORD

chewing gum) although for the years in question the actual cost per unit was 19.18 cents, 19.86 cents, 21.63 cents, and 22.23 cents respectively.

3.—The Appellant, in assessing the Respondent to income tax for the years 1936, 1937, 1938 and 1939, in respect of " the net profit or gain arising from the business . . . . in Manitoba " of the Respondent, has treated such profit or gain as being the selling price of the chewing gum supplied to buyers by the Winnipeg office of the Respondent from the Manitoba warehouse, less the costs incurred by the Respondent in respect of such chewing gum. These costs included such costs as manufacturing, packing, carriage, advertising, and a proportionate part of the expenses of the Respondent's head office in Ontario. The Appellant made no allowance to the Respondent for a " manufacturing profit " on the Respondent's manufacture in Ontario of the chewing gum sold. Before making the assessments the Appellant had considered a " brief " submitted by the Respondent, setting out alternative bases of calculating such a " manufacturing profit."

Exhibit 6 and schedules thereto ; Exhibit volume pp. 24–37

4.—The controversy between the parties is on the meaning and application of Section 24 of The Manitoba Income Taxation Act which is as follows :

" 24. (1) The income liable to taxation under this Part of every person residing outside of Manitoba, who is carrying on business in Manitoba, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Manitoba.

(2) This section shall apply to a taxpayer which is a corporation or joint stock company carrying on business in Manitoba and which has not its head office in Manitoba."

Other sections of the Act which have been considered by some of the Judges to be relevant are :

" 9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person

* * * * *

(d) who, not being resident in Manitoba, is carrying on business in Manitoba during such year ;

* * * *

a tax at the rates applicable . . . .

(Subsection (2) and the first schedule fix the rates applicable where the taxpayer is a corporation)

" 23. Where any corporation carrying on business in Manitoba purchases any commodity from a parent, subsidiary, or associated corporation at a price in excess of the fair market price, or where it sells any commodity to such a corporation at a price less than the fair

market price, the minister may, for the purpose of determining the income of such corporation, determine the fair price at which such purchase or sale shall be taken into the accounts of such corporation. RECORD

" INCOME FROM OPERATIONS IN MANITOBA

" 26. (1) Where a non-resident person produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything within Manitoba and exports the same without sale prior to the export thereof, he shall be deemed to be carrying on business in Manitoba and to earn within Manitoba a proportionate part of any profit ultimately derived from the sale thereof outside of Manitoba.

" (2) The minister shall have full discretion as to the manner of determining such proportionate part.

" 27. (1) Any non-resident person, who lets or leases anything used in Manitoba, or who receives a royalty or other similar payment for anything used or sold in Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

" (2) The minister shall have full discretion as to the manner of determining such proportionate part.

" 27A. (1) Any non-resident person soliciting orders or offering anything for sale in Manitoba through an agent or employee, and whether any contract or transaction which may result therefrom is completed within Manitoba or without Manitoba, or partly within and partly without Manitoba, shall be deemed to be carrying on business in Manitoba and to earn a proportionate part of the income derived therefrom in Manitoba.

" (2) The minister shall have full discretion as to the manner of determining such proportionate part.

" 28. Nothing in the three last preceding sections shall in any way affect in generality of the term " carrying on business " used elsewhere in this Part.

" 47. The minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made, the minister may determine the amount of the tax to be paid by any person.

" 54. (1) After examination of the taxpayer's return the minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by him in his return."

5.—The Judgment of the Supreme Court of Canada restores the Judgment of Major J., which held that the Respondent is entitled to allocate p. 202, l. 4 pp. 144–146;

pp. 147–151
p. 150, ll. 41–44
p. 151, ll. 15–24
p. 79, l. 3 to p. 80, l. 3; Exhibit volume pp. 86–89
p. 85, l. 3

a portion of its profits to the manufacturing division in Ontario, and that such portion is not subject to the income taxation provisions of the Manitoba statute. Major J. adopted a formula of apportionment "prepared on a pro ration of costs basis." This basis was advanced for the first time by one of the Respondent's witnesses during the course of the hearing.

6.—The basis thus adopted by Major J. was the witness's own formula and it differed entirely from the other bases of apportionment which had been advanced in argument by the Respondent before the Appellant, prior to the assessments. These other formulas had claimed as "manufacturing profit" on each unit of the respondent's goods sold in Manitoba, the difference between the actual cost of such unit and 28 cents, an arbitrary amount set by the Respondent as the "transfer price" for ordinary chewing gum when the goods were transferred from the manufacturing division in Ontario to the selling division in Manitoba. This transfer price remained constant at 28 cents during the years in question, although the actual costs in those years were 19.18 cents, 19.86 cents, 21.63 cents and 22.23 cents.

p. 59, ll. 10–32
p. 53, l. 15 to p. 54, l. 16

7.—The new formula apportioned the total profits from the sales made in Manitoba between the factory division and selling division in the respective ratios that the factory cost and the selling cost bore to the total costs. In percentage figures 55.51 per cent. of the total profits from such sales was allocated to the factory, and 44.49 per cent. to the selling division in 1936. These figures changed to the detriment of the taxing authorities in the other years until, in 1939, 64.05 per cent. was allocated to the factory and only 35.95 per cent. to the selling division. (See Exhibit 31, Table X.)

p. 79, l. 15 to p. 80, l. 3; p. 83, ll. 13–38
Exhibit volume p. 88

8.—The formal Judgment of the Court of King's Bench makes declarations of the amount of the Respondent's profit or gain arising from its business in Manitoba in each of the years 1936 to 1939 in accordance with this formula and the minister is instructed to assess the Respondent to income tax on that basis.

pp. 145–146

9.—The majority Judgment of the Court of Appeal for Manitoba reversed Major J. McPherson C.J.M., with whom Dennistoun J. concurred, held that Section 24 of the Income Taxation Act does not require apportionment of the ultimate profit between the province of manufacture and the province of sale. If, contrary to his view, the law required apportionment he would not have accepted the formula of apportionment adopted by Major J., which he severely criticised.

pp. 153–161
p. 161, ll. 3–19

10.—Bergman J. held that Section 9 is the taxation section but that Section 24 furnishes a statutory definition of taxable income which is to be applied to cases coming within Section 24. He further held that

pp. 166–186

Section 24 neither provides for nor contemplates an apportionment of the profit and certainly does not prescribe the formula suggested. He adopted the argument of the appellant that in all cases where the Act provides for apportionment, the Act gives the minister full discretion as to the manner of determining the proportionate part of the income or profit taxable in Manitoba and that it is inconceivable that any Legislature would pass an Act providing for apportionment without giving the minister arbitrary power to make the apportionment. He therefore thought the appeal should be allowed and the decision of the minister restored. p. 186, ll. 14–27 p. 186, ll. 7–11

11.—Trueman J. (dissenting) would have dismissed the appeal but apparently proceeded on a misunderstanding of the facts as he assumed that the chewing gum was forwarded from Toronto to jobbers and traders in Saskatchewan and Alberta. The point raised by Trueman J. was not even argued by the Respondent in the Supreme Court of Canada. pp. 162–165

12.—Dysart J. (dissenting) held that the Act recognizes that profits on goods may be earned by processes or operations carried on outside of Manitoba leading up to the sale of the goods in Manitoba and that such profits are not properly taxable by Manitoba. He held that the Act confines taxation to such portion of the entire net profits as in fact arises from or may reasonably be attributed to the Manitoba share of the entire business of the Company. pp. 187–195 p. 188, ll. 29–35

13.—Although Dysart J. thus adopted the theory of apportionment, he criticized the disposition of the case by Major J. He held that there is no other person than the Appellant designated under the Act to determine the amount of the assessment, but the trial Judge himself made a finding of the amount of the tax, and in the formal Judgment directs that the Appellant adopt it, thereby invading the field which the Act assigns exclusively to the minister. Moreover, that amount was determined upon a formula, prepared by an expert accountant and submitted at the trial, which might or might not provide a way of determining the correct amount, but if a valuable guide to the Appellant, he is not bound to adopt it and the Court should not attempt to force it upon him. p. 194, ll. 4–16 p. 194, ll. 17–33

14.—Dysart J. further said, for the additional guidance of the Appellant, that the "manufacturer's profit" so-called, which the Respondent included in its return, is unsound in principle as well as in terminology, and was an arbitrary amount not related to the varying costs of the years in question. Accordingly it was not necessarily to be adopted by the Appellant. p. 194, ll. 24–35

15.—Dysart J. would, therefore, have varied the formal Judgment below by withdrawing from it the amount of the tax (or taxable income), and the direction to the Appellant to adopt that amount. He would refer the matter back to the Appellant to determine the amount of taxable income on the principle of apportionment indicated by Dysart J. p. 195

p. 201

16.—The appeal to the Supreme Court of Canada from decision of the Court of Appeal was twice argued. On the 18th June, 1947, the Appeal was allowed and the Judgment of Major J. restored (Rinfret C.J.C., Taschereau and Estey JJ. ; Rand and Kellock JJ., dissenting).

pp. 203–208
p. 205, ll. 2–5

17.—The reasons for Judgment of Rinfret C.J.C. and Taschereau J. set out the proposition that " if the profits arise where the sales are made then the assessments are valid, but if the manufacturing profits are deductible when computing the gain made in Manitoba and on which the tax is imposed, this appeal must succeed." They then adopt the reasoning of Duff C.J.C. in the *International Harvester Company* case. (This case has now been determined in the Privy Council and is reported in (1949) A.C. 36) and therefore hold that the Appellant is entitled to an allowance as profit on the actual cost of manufacture. As a result he allowed the Appeal and restored the Judgment of Major J., without in any way considering whether Major J. was entitled himself to declare the amount of profit and to direct the Appellant to adopt a particular formula of apportionment. These Judges do not even mention the formula but merely hold that the Respondent is entitled to " an allowance " of profit on manufacture.

p. 205, l. 6 to
p. 206, l. 44

p. 208, l. 17

pp. 218–226

18.—Estey J. also held that the Appeal should be allowed and the Judgment of Major J. restored. On a review of the Australian cases and the Kirk and International Harvester case, he held that where statutory limitations are imposed upon the taxing authorities, the principle of apportionment has been approved.

pp. 208–211
p. 210, ll. 20–42

19.—Rand J. dissented and would have dismissed the Appeal. He held that the sales in Manitoba are obviously the final step in an over-all business embracing manufacture and sale ; but for the purposes of Manitoba, they and their clustered elements are a segregated and distinct business of themselves. If there is a business from which profits must " arise," a sufficient basis in fact for the legislative assumption, as he thought the case here, jurisdiction to tax the entire profit on that, apart from any other ground, is established ; in the absence of modifying language in the context the profit " arising from " that business is the entire profit ; and the cost to that point, even though a manufacturing cost, determines the amount of it.

p. 211, l. 40 to
p. 218, l. 10

20.—Kellock J. also dissented and would have dismissed the Appeal. He held that in any case where there is a carrying on of business within the province by reason of the habitual making of contracts of sale therein, Section 24 applies, and the entire profit arising from such sales is taxable and there is no apportionment. He rejects the argument of the Respondent that the net profit or gain " arising from the business " in Manitoba means the net profit arising from the company's " operations " in Manitoba.

21.—Kellock J. then carefully compares the English legislation with Section 24 of the Manitoba Act and is of the opinion that they do not differ in meaning and, therefore, the decisions under the Imperial statutes are pertinent. He further held that as Section 24, like schedule " D " of the United Kingdom statute, stands alone, there is nothing upon which any apportionment of profit over the various operations of the Company can be based. When the Legislature intended to provide for apportionment of profits to operations they did so expressly in Sections 26, 27 and 27A. The fact that there is no similar provision in Section 24 is not only significant but, in his opinion, conclusive. p. 214, l. 31 to p. 217, l. 44 p. 217, l. 44 to p. 218, l. 2

22.—The Appellant submits that the Judgment of the trial judge is wrong in principle and should not have been restored, and that this Appeal should be allowed with costs, and the assessments in question be referred back to the Appellant to determine the amount of the taxable income of the Respondent for the reasons given particularly by McPherson C.J.M., and Dysart J.A., and for the following amongst other

REASONS

1. BECAUSE the Appellant is the only person designated in the Act to make an assessment of the tax payable, and the Court should not usurp his functions.
2. BECAUSE the trial judge erred in directing that the Appellant must adopt a particular formula of apportionment which he had had no opportunity to consider.
3. BECAUSE the Act provides that the Appellant should apportion where apportionment is called for, but in this case Major J. himself apportioned the profits on a basis never even brought to the minister's attention.
4. BECAUSE the selection of the method of apportionment of profits is a practical matter for the Appellant to decide after due consideration of the possible formulæ or methods of apportionment.
5. BECAUSE the Supreme Court of Canada failed to consider whether the formula adopted by Major J. was a proper formula, or if so, was the only permissible method of apportionment.
6. BECAUSE the Supreme Court of Canada erred in restoring a Judgment which, contrary to the Act, had apportioned profits under a particular formula of apportionment.

GLYNN COUSLEY.
FRANK GAHAN.

In the Privy Council.

No. 46 of 1948.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE PROVINCIAL TREASURER OF MANITOBA ... APPELLANT

AND

WM. WRIGLEY JR. COMPANY LIMITED ... ... RESPONDENT.

CASE FOR THE APPELLANT

BLAKE & REDDEN,
17 Victoria Street,
Westminster, S.W.1,
Solicitors for the Appellant.

(A50291) VACHER & SONS, LTD., Westminster House, S.W.1.